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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KYLE D. MALBRUE,

Defendant and Appellant.

B143293

(Super. Ct. No. BA199000)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Jeffrey B. Kahan, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Kyle D. Malbrue appeals from the judgment entered following a jury trial that resulted in his convictions for two counts of first degree murder. Malbrue was sentenced to two concurrent terms of life in prison without the possibility of parole, plus 10 years.

Malbrue contends: (1) the evidence was insufficient to sustain the judgment; and (2) the trial court erred by admitting gang evidence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Viewed in the light most favorable to the judgment (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established the following.

a. *Prosecution's case.*

(i) *Events prior to the murders.*

Malbrue was a member of the “94 Hoover” criminal street gang, and was known by the moniker “Hoover Mac” or “Mac.” In 1997, at the time the instant murders were committed, Malbrue lived intermittently at the home of Donna Footman and intermittently at an apartment Malbrue sometimes shared with Sherman Arthur, also known as “Little Polo.” Like Malbrue, both Footman and Arthur were members of the 94 Hoover gang. Arthur had at times acted as a paid narcotics informant.

The 94 Hoover gang considered most other non-Hoover gangs to be their enemies. The Hoover gang and the 87 Gangsters were especially bitter rivals.

Approximately one week before the murders, Arthur, Malbrue, and others drove past a house located at 9305 South San Pedro Street, near the corner of 93rd and San Pedro streets, looking for rival gang members. One of the occupants of their car stated that “Donnell” (identified by other evidence as Donnell Durden) who lived at 9305 South San Pedro, had “done some wrong” by leaving a woman or girl on the freeway when she refused to engage in sexual relations with him. According to Arthur, the woman was reputedly the sister of a member of the 11-Deuce Hoovers, a subclique of the Hoover gang. This treatment of one of the “Hoover sisters” angered members of the Hoover gang. One of the car’s occupants stated that, sooner or later, Donnell was “going to get got,” i.e., hurt.

On August 5, 1997, the date of the murders, an 11-Deuce Hoover gang member known as “Slim” asked Arthur about Malbrue’s whereabouts. Arthur declined Slim’s invitation to drive to the intersection of 93rd and San Pedro streets. Later that day, after 4:00 p.m., Arthur saw Slim and Malbrue together. Malbrue removed three guns that were stored at the apartment he and Arthur shared, a .9-millimeter pistol, a 380-caliber handgun, and a sawed-off shotgun. The .9-millimeter pistol belonged to Malbrue.

(ii) *The murders of Haynes and Johnson.*

On August 5, 1997, at approximately 9:45 p.m., Travis Foster, 12-year-old Errol Haynes, 19-year-old Shaintaine “Rashown” Johnson, and Taniya Hicks were talking in the driveway outside 9305 South San Pedro Street, where both Durden and Haynes lived.

Haynes, who was Durden's nephew, was sitting on the bumper of a van parked in the driveway. Durden left to visit a friend.

At the same time, Jamiya Chandler, Travis's brother Corey Foster,¹ Chandler's cousin Jamonte, the Fosters' cousin Devlon, and a woman named "Ebony," were talking at Chandler's apartment near the corner of 93rd and San Pedro streets.

Chandler saw a dark, "raggedy" car with three occupants drive around the corner three times. On the third pass, the car stopped at the intersection of 93rd and San Pedro streets. Chandler saw a tall, black man wearing a dark plaid shirt exit the car and walk toward Durden's home. She then heard gunshots, and ran inside her residence. From the window, she saw the man return to the car. She did not get a good look at his face and was unable to identify him later.

Travis also saw the car pull to a stop at the corner. Malbrue exited the car and walked toward the group talking in the driveway. Another man exited the car and initially walked behind Malbrue, but did not approach the Durden/Haynes house. Malbrue removed a black semiautomatic handgun from his waistband. When Malbrue reached an adjacent driveway, he began firing at the group in Durden's driveway, and at the ground. Travis and Johnson ran for the door of the Haynes residence, but Haynes's grandmother was too frightened to open the door. Johnson arrived at the doorstep a few seconds after Travis, bleeding from a gunshot wound in his chest.

¹ For ease of reference, and with no disrespect, we will hereinafter refer to the Foster brothers by their first names.

When shown a photographic lineup on October 20, 1997, Travis, with shaking hands, identified Malbrue as the shooter. Travis also identified Malbrue as the shooter at the preliminary hearing and at trial. Travis told police that the car from which Malbrue had come was a faded, gold four-door Ford with tinted windows, with smoke coming from the front grille. He described Malbrue as a Black male, 18 to 20 years old, 6 feet tall, with a thin build, wearing black clothing. At trial, Travis described Malbrue's shirt as a black plaid, and said Malbrue had worn his hair in short braids.

Corey also saw the car stopped at the corner. He saw Malbrue and another man exit the car. The second man reentered the car, but Malbrue walked towards 93rd Street, turned the corner, and headed toward Durden's house. Contrary to Corey's preliminary hearing testimony, Corey had seen Malbrue before and recognized him immediately; he got a good look at Malbrue's face on the night of the murders.² After Malbrue walked around the corner, Corey heard a series of gunshots. Corey then saw Malbrue run back and enter the car, which sped up 93rd Street. Corey went around the corner, where he found Errol lying in the driveway next to the van, with a gunshot wound to his head.

At trial, Corey identified Malbrue as the man he had seen walk from the car. Corey had described Malbrue's hair to police as a one-inch natural style; he did not recall

² Corey testified that he had lied at the preliminary hearing out of fear. Corey's mother had told him not to testify in court. Corey recounted that, because he and Travis were testifying, they were no longer welcome in their mother's home. Corey had decided to tell the truth because a young boy had been killed.

Malbrue wearing braids.³ Corey testified that Malbrue had worn a tan “Pendleton” plaid shirt. He described Malbrue’s car as an old, brown or dark Regal with tinted windows and a broken taillight.⁴

Haynes had been shot in the head and foot; Johnson had been shot in the chest. Both died of their gunshot wounds.

(iii) *Malbrue’s admissions to various persons after the murders.*

Arthur testified that on the evening of the murders, he saw Malbrue walking alone. Arthur asked about the guns Malbrue had removed from the apartment earlier. Malbrue stated that he had been riding in a car with two other persons, and had shot two “87 Gangsters” in their heads at a brown house near the intersection of 93rd and San Pedro streets. Malbrue said the victims had been leaning against a car, but fled toward the house. On August 6, 1997, Arthur contacted a detective and told him that Malbrue had confessed to shooting two people at 93rd and San Pedro streets.⁵

³ Other evidence suggested that, on the date of the murders, Malbrue wore his hair in braids. However, Footman, who often braided Malbrue’s hair, testified that Malbrue often allowed the ends to come undone. When he failed to maintain his braids, the back of his hair became “real fuzzy and poofy.”

⁴ Out of fear, Corey had falsely testified at the preliminary hearing that the vehicle was “like” a Ford.

⁵ Arthur testified that he made arrangements with the police to aid them in apprehending Malbrue when Malbrue was in possession of the murder weapon. Arthur was unsuccessful in these endeavors. The defense presented the testimony of Detective Brian Agnew, who recounted that he did not tell Arthur to attempt to catch Malbrue with the gun. He did, however, tell Arthur “to get close to Hoover Mac. If he has the gun on him, you page me, I will set up a team and a surveillance, and we’ll take him down with the murder weapon on him.”

Approximately one week before his arrest, Malbrue told Footman that the police were looking for him because he had killed someone in the “midwest” area, which in the vernacular included the area of the crime scene.

Footman’s mother, Vickie Mason, testified that Malbrue had told her the police were looking for him in regard to a murder. Mason asked, “ ‘Are they looking for you for just cause?’ ” and Malbrue replied, “ ‘Yes.’ ” Footman’s brother, Willie Footman, who had been a fellow 94 Hoover gang member, overheard a telephone conversation in which Malbrue explained the shooting to another gang member. Malbrue stated that he “didn’t know it was no . . . little kid out there.”

(iv) *Firearms evidence.*

Footman testified that in 1997, prior to the murders, she and Mason had hidden guns for Malbrue, including a long-barreled revolver, a short-barreled revolver, and a .9-millimeter semiautomatic pistol. Footman and Arthur described how the members of the 94 Hoover gang shared weapons and stored them in various locations. Arthur testified that a .9-millimeter handgun, a 380 handgun, and a sawed-off shotgun were stored at his and Malbrue’s apartment.

On September 4, 1997, the 94 Hoover gang held their annual picnic. Cozette Gray, a long-time 94 Hoover gang member, attended with her husband, Maurice Howard. Howard videotaped portions of the event. Malbrue pointed a gun at Howard while Howard was videotaping. The videotape was played for the jury. Arthur testified that

the gun on the tape looked like the .9-millimeter pistol Malbrue removed from the Arthur/Malbrue apartment the day of the shooting.

After the shooting and approximately one week before his arrest, Malbrue brought the .9-millimeter pistol to Footman's home. Footman had seen Malbrue carry the gun on numerous occasions, and had seen him point it at Howard at the picnic. The day before police searched Footman's house, Footman gave the gun to another person because she had been warned that police were watching her home.

Police discovered three expended 380 caliber casings and one live .9-millimeter round in the driveway at the murder scene. Police also discovered a medium caliber bullet fragment in the driveway, and another fragment from the back of the driver's seat of the van that had been parked in the driveway. The bullets recovered from Haynes's body were fired from a 380 weapon. The bullets recovered from Haynes's body, the seat in the van, and in the driveway were fired from the same weapon.

(v) *Evidence related to efforts to intimidate witnesses.*

Chandler did not talk to police about the case until January 24, 2000. In February 2000, approximately 30 female members of the Hoover gang attacked Chandler, her mother, her grandmother, and her sister. The attackers told the women to keep their mouths shut. The attack left Chandler with a black eye and a "knot" on her head; her sister with a broken finger; and her mother and elderly grandmother with bruises.

After Footman spoke to police, Malbrue telephoned her from jail and accused her of "snitching" on him. He told her not to "come to court," as "they don't like snitches."

Malbrue's friends repeatedly berated her for snitching. Footman asked Malbrue to tell his friends to "cool it." Malbrue replied that Footman and her family were "lucky that he's not out of jail, because we wouldn't even be living no where [*sic*] on 89th."

Footman and Mason had repeatedly arranged three-way telephone conversations for Malbrue when he called them collect from jail. In several of those conversations, Malbrue advised Edmond not to come to court, or her brother (a gang member) would beat her.⁶

Malbrue made threatening calls to Mason. He threatened to kill her if she refused to take his collect calls. Malbrue told her he "had gotten paperwork" alerting him that Mason would testify. Malbrue told Mason that "when he got out, I wasn't gonna be living on 89th anymore, and the way he was saying it, there was no doubt in my mind that he meant I might not be living anywhere anymore." A gang member with the moniker of "Crim" shot Mason's dog after ordering her, at gunpoint, not to associate with persons who did not belong to the 94 Hoover gang. Mason received other threats from Malbrue and other gang members.

Another of Malbrue's friends intimidated Mason's daughter, Venesha. As Venesha walked home from elementary school, a man stood across the street and exposed a weapon in his waistband to her, causing her to become hysterical.

⁶ Edmond testified that she had been dating Durden near the time of the murders. Durden testified that Edmond told him her brother was a 94 Hoover gang member. Durden testified that Edmond had called him after the shootings to say Durden had been the intended target of the shooting; she had had nothing to do with the shootings; and she had heard that "Hoover Mac" was the culprit.

Donna Footman's brother, Willie Footman,⁷ was a 94 Hoover gang member.⁸ He was incarcerated at the time of the murders. Upon his release, he learned from other gang members that his mother was a witness in the case and his sister "opened her mouth at the wrong time." Willie heard several conversations in which Malbrue warned Edmond not to testify. Willie also overheard a conversation in which Malbrue told another 94 Hoover gang member to return to the crime scene and "handle" – i.e., beat, frighten, or kill -- two boys who had witnessed the crime.

After Mason's dog was shot, Willie spoke to Malbrue. Malbrue asked why Mason had snitched on him. Willie hung up. Malbrue called repeatedly, asking if Willie was scared. Malbrue told Willie that if Mason testified, Malbrue would "kill all of us." Willie was attacked and cut by persons he believed to be 94 Hoover gang members.

Arthur testified that during a three-way telephone call, he had heard Malbrue direct another gang member to "talk" to Footman; Arthur believed this was a solicitation to vandalize Footman's home. Arthur also heard Malbrue state that Chandler (whom he identified by her description and residence) had seen the crime.

Malbrue repeatedly called Footman and harassed her, as did other members of the 94 Hoover gang. Footman's house was firebombed on December 13, 1998. Footman saw a 94 Hoover gang member, Laron Gibson, running from the scene. Footman's

⁷ For ease of reference, and with no disrespect, we hereinafter refer to Mr. Footman by his first name.

⁸ At the time of trial, Willie had ceased to be a 94 Hoover gang member.

boyfriend had been arrested the day before the firebombing for shooting at a 94 Hoover gang member. Footman speculated to police that her house had been firebombed because she had disassociated herself from the gang.

Arthur testified that, during the trial, he had walked past Malbrue. Malbrue had hummed a song by performer “Snoop Dog,” that “[t]ells about people who tell on people,” a “song about snitches.”

b. *Defense evidence.*

Malbrue testified in his own defense. He denied participating in the shooting, driving past the crime scene in the week prior to the murders, or making incriminating statements to Mason, Footman, or Arthur. Malbrue presented an alibi defense. He testified that he spent August 5, 1997, with 94 Hoover gang member Daryl “Big Polo” Oliver on 94th Street. Malbrue recounted how he had accompanied Oliver to a high school to pick up Oliver’s daughter after Oliver received a call from the school indicating that the daughter was having problems. The group then went to Watts, to a pet shop, to a park where Malbrue drank and smoked marijuana with his “homeboys,” and eventually returned to the Oliver home, where Malbrue remained until approximately 8:00 or 8:30 p.m. Oliver’s testimony generally corroborated Malbrue’s.

After leaving the Oliver home, Malbrue returned to 90th Street and his aunt’s house, where he lived. Across from the aunt’s house he encountered Anessa Richardson, Dina Felix, and Donya Phyllis. Malbrue used Richardson’s telephone to speak to a girl.

Malbrue then tried unsuccessfully to telephone his sister, as it was her birthday. He left and went to the aunt's house sometime between 9:00 and 10:00 p.m.

Richardson's testimony generally corroborated Malbrue's. She stated that Malbrue came by her house on August 5, 1997 between approximately 7:30 to 8:00 p.m., and asked to use her telephone so he could call his sister and wish her a happy birthday. However, Richardson's mother was using the phone. Malbrue briefly left and used Felix's telephone down the street, and then returned to Richardson's house. Malbrue left Richardson's home between 11:00 and 11:30 p.m., while the Jerry Springer Show was airing. Richardson had borne a child by 11-Deuce Hoover gang member "Slim."

When police questioned Malbrue about his whereabouts on the date of the murders, Malbrue replied, " 'I was probably at the park, because I'm at the park everyday.' " He was unable to recall specific events, " 'because I smoke like weed, man. I could have been anywhere.' " He added, " 'Where was I [on] August 5th? I could have been anywhere' " and " 'I be running around all day, man.' " Malbrue did not describe his activities with Oliver and Richardson to the police.

Malbrue denied threatening witnesses, although he admitted he had told fellow gang members that Mason had made statements about him and she and Footman were testifying against him; he also told Footman and Mason that he had documents related to the case bearing their names. Malbrue believed Footman was hostile to him because he had told another gang member that Footman had engaged in sexual relations with him, and because he had been embroiled in a conflict with her boyfriend.

Malbrue testified that the gun he had pointed at the picnic was a toy gun. A police officer testified that on September 7, 1997, he had issued a jaywalking citation to a man who was probably Malbrue, but who used a different name; at that time, Malbrue was carrying a toy gun. It did not look very realistic.

Lewin Hill, a 94-Hoover gang member with the moniker “Hoover Lou,” testified that he had been incarcerated at the time of the shooting. Arthur had initially told police that “Hoover Lou” drove the car when he, Malbrue, and others had driven by Durden’s home before the shootings. At trial, however, Arthur no longer believed Hoover Lou had been with the group.

Taniya Hicks testified that she had been talking with Haynes and Haynes’s sister in Haynes’s driveway when the shooting occurred. She saw three men with guns walk from 93rd Street toward Haynes’s home, but she tried not to see their faces and fled as soon as she heard shots. She testified that she had told police, “I didn’t see nothing. I didn’t see nobody.” Hicks admitted she had seen three people approach the driveway with guns, but insisted she had not seen their faces and was unable to make an identification from two photographic lineups. Hicks explained she had tried to avoid seeing their faces, because if she had, the assailants would have shot her. Hicks did not wish to testify and did so only after she was arrested. Because she had not seen the mens’ faces, she did not know whether Malbrue was the shooter or not. Detective Murphy, however, testified that Hicks gave a more complete description of two suspects when he had interviewed her prior to trial.

Los Angeles Police Detective Brian Agnew testified that he had a working relationship with informant Arthur. Arthur informed Agnew, without payment, that he had information that Hoover Mac had committed the murders. Arthur told Agnew that the shooting avenged an alleged rape of a 94 Hoover associate known as “No Name.” Arthur told Agnew that Malbrue used a .9-millimeter pistol and a 380 firearm in the commission of the crimes.

Detective Murphy testified to a November 29, 1999 police interview of Arthur. Arthur said Malbrue admitted shooting one person, and said a second man shot the other victim. In a subsequent interview on December 6, 1999, Arthur clarified that Malbrue had not actually reported that the second man fired a shot. Instead, Arthur had assumed this was the case, because “that’s how they did business.”

In January 2000, Arthur told Detective William Smith that Lavonte “Baby Dev” Willis had been present when “Slim” picked up Malbrue on the date of the murders. Willis testified that on August 5, 1997, he had been incarcerated in Ironwood State Prison.

Willis denied participating in any telephone conversations in which Malbrue asked him to intimidate witnesses and denied threatening witnesses. Willis believed, however, that Footman and Mason were “snitches.”

c. Prosecution’s rebuttal.

Among other things, the prosecution presented testimony from a vice principal regarding the school where Oliver’s daughter was a student. The vice principal testified

that students were not allowed to leave the campus during the school day unless a parent picked them up. The school was gated, and a guard at the front door ensured that all persons coming into the school signed in. Parents were required to sign a log before taking their children out of school. School records for Oliver's daughter, Crystal, indicated that she was truant in the morning and at noon on August 5. Oliver's son was absent from approximately 1:15 in the afternoon. Records suggested Crystal and her brother simply "ditched" class. The sign out sheet for August 5, 1997, did not show that Oliver had signed his children out of school on that date. There was no record that the school had called Oliver and asked him to pick the children up.

2. Procedure.

Trial was by jury. Malbrue was found guilty of the first degree murders of Johnson and Errol. (Pen. Code, § 187, subd. (a).) The jury also found true allegations that Malbrue personally used a firearm during commission of the offenses within the meaning of section 12022.5, subdivision (a)(1). It also found true the special circumstance that Malbrue was found guilty of two first degree murders. The trial court sentenced Malbrue to two concurrent terms of life in prison without the possibility of parole, plus 10 years for the firearm use enhancement. It also ordered Malbrue to pay various fines.

DISCUSSION

1. *The evidence was sufficient to sustain the convictions.*

When determining whether the evidence was sufficient to sustain a conviction, “our role on appeal is a limited one.” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) “[T]he test of whether evidence is sufficient to support a conviction is ‘whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citations.]” (*People v. Holt* (1997) 15 Cal.4th 619, 667.) “We draw all reasonable inferences in support of the judgment. [Citations.]” (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears that “ ‘upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Here, the evidence was more than sufficient. Travis was an eyewitness to the murders, and identified Malbrue, both before and at trial, as the shooter. Corey’s testimony provided powerful circumstantial evidence against Malbrue, in that he saw Malbrue exit the car, walk toward the murder site, return to the car, and flee after gunshots were fired. While Chandler was unable to identify Malbrue as the man she saw exit the car, her testimony nonetheless generally corroborated the Foster brothers’ accounts.

This evidence was further buttressed by Malbrue’s admission to Arthur that he had committed the murders, and his highly incriminating statements to Footman, Mason, and

Willie. Moreover, the evidence showed that Malbrue had access to weapons of the sort used in the killings. Arthur's testimony regarding his and Malbrue's earlier trip past Durden's house, and Malbrue's statement after the murder, provided potential motives for the shootings. Finally, the extensive evidence of Malbrue's efforts to intimidate witnesses in the case demonstrated Malbrue's consciousness of guilt. In short, there was ample evidence that Malbrue committed the murders.

Malbrue, however, argues that the witnesses' testimony was "chaotic, and colored with multiple biases, engendered by a complex web of interpersonal relationships." He posits that, "the testimony was a mishmash of substandard testimony, offered by poor quality witnesses." He suggests that because the witnesses had close ties and lived in the same neighborhood, "all their testimony was tainted by the neighborhood 'buzz' about the events." He surmises that "the prosecution case against [appellant] amounted to a mélange of rumor and speculation, amongst an incestuous group of prosecution witnesses of highly doubtful veracity," and "there were so many quarrels among the interrelated prosecution witnesses – most of whom were prone to violence and the telling of false and true tales upon one another – that it is difficult to pin down any one allegation as true."

We are unpersuaded. Malbrue's arguments amount to a request that this court reweigh the evidence and judge the credibility of the witnesses. Such is not the function of an appellate court. (*People v. Diaz* (1992) 3 Cal.4th 495, 541; *People v. Palma* (1995) 40 Cal.App.4th 1559, 1567.) Evidence is not deemed insufficient merely because contrary evidence was also presented. " 'Conflicts and even testimony which is subject

to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]’ ” (*People v. Lewis* (2001) 26 Cal.4th 334, 361; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139; *People v. Palma, supra*, 40 Cal.App.4th at p. 1567; *People v. Mobley* (1999) 72 Cal.App.4th 761, 788 [in determining sufficiency of evidence, reviewing court will not reweigh evidence; credibility of witnesses and weight of the evidence are matters determined exclusively by the trier of fact]; *People v. Bento* (1998) 65 Cal.App.4th 179, 193 [though appellate court ensures the evidence is reasonable, credible, and of solid value, it is the exclusive province of trier of fact to determine witness credibility and truth or falsity of facts upon which the determination of guilt depends].) An appellate court “may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding. [Citations.]” (*People v. Ceja, supra*, 4 Cal.4th at p. 1139.)

Although Malbrue contends that the prosecution failed to offer consistent testimony rebutting his alibi defense, as he acknowledges the witnesses establishing his alibi defense were impeached. It was for the jury, not this court, to determine whether the evidence of Malbrue’s alibi was credible. Malbrue’s contention that the prosecution witnesses were unsavory characters, “of the very lowest moral caliber,” who had suffered prior convictions, admitted to gang membership, or admitted to immoral or criminal behavior, does not establish insufficiency. It is axiomatic that evidence is not deemed insufficient merely because a witness has suffered a conviction or engaged in prior

misconduct, and the jury was so instructed. (CALJIC No. 2.23.) While Malbrue points to various purported contradictions in the evidence and weaknesses in the People's case, our review of the record has not convinced us that these matters were of sufficient import to render the evidence inherently improbable or legally insufficient. Finally, our review of the record does not support Malbrue's characterization that most witnesses were merely repeating neighborhood rumors, or that their testimony had been tainted by talk in the neighborhood or their associations with each other. The evidence was sufficient to support the convictions.

2. The trial court did not err by admitting evidence regarding gangs.

Malbrue next urges that the trial court abused its discretion by admitting excessive evidence regarding gang practices. We disagree.

a. Additional facts.

Prior to trial, the trial court and the parties addressed, at a hearing pursuant to Evidence Code section 402, the questions of: (1) whether evidence regarding gangs was admissible; and (2) whether the videotape of the gang picnic was admissible. Based upon the prosecutor's offer of proof, the trial court found the "testimony of gang affiliation is overwhelmingly admissible[,] otherwise we have an act that makes no sense, makes so little sense that it would wrongly impeach the credibility of the witnesses [¶] If you didn't know these folks belonged to rival gangs it would make no sense" to suggest that Malbrue walked up to total strangers and shot them without reason. The court explained, "I am very sensitive about gang evidence. I think that gang evidence is inflammatory. I

have seen the reaction of jurors when gang evidence comes in and it's very negative.

That doesn't mean it is not admissible. But I do screen the evidence very carefully and in this case absent the evidence of gang affiliation the shootings make absolutely no sense.

[¶] I mean this is critical evidence of motive. Motive is an important aspect of the case."

The trial court also found the gang evidence was "extraordinarily probative" on the issue of witness intimidation. It likewise found the evidence that Malbrue was seen, a month after the shootings, with a gun that matched the one used in the shootings, was extraordinary probative. Thus, the court found the probative value of the evidence "clearly" outweighed any prejudicial effect.

b. *Discussion.*

Gang evidence is inadmissible if introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]" (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) However, such evidence is admissible if relevant to issues in the case, is not more prejudicial than probative, and is not cumulative. (Evid. Code, § 352; *People v. Sandoval* (1992) 4 Cal.4th 155, 175; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240.) For example, gang evidence may be admissible if relevant to the issues of motive or credibility. It may also be admissible to show that the victim was a member, or perceived to be a member, of a rival gang. (*People v. Williams* (1997) 16 Cal.4th 153, 193-194; *People v. Sanchez, supra*, at pp. 1449-1450; *People v. Ruiz, supra*, at p. 241; Evid. Code, §§ 210, 780.) Even if gang evidence is relevant, it may have a highly inflammatory

impact on the jury. Thus, “trial courts should carefully scrutinize such evidence before admitting it. [Citation.]” (*People v. Williams, supra*, 16 Cal.4th at p. 193.)

A trial court’s admission of evidence, including evidence related to a defendant’s gang membership, is reviewed for abuse of discretion. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369 [trial court’s admission of gang evidence over Evidence Code section 352 objection will not be disturbed on appeal unless the trial court’s decision “exceed[ed] the bounds of reason”]; *People v. Funes* (1994) 23 Cal.App.4th 1506, 1519; *People v. Barnett* (1998) 17 Cal.4th 1044, 1118.)

We find no abuse of discretion. As the trial court found, evidence that Malbrue belonged to the 94 Hoover gang, and that the 87 Gangsters gang was a rival, was highly probative of the motive for the shooting. Arthur testified that Malbrue and other gang members drove past Durden’s home to look for rival gang members, and that, after the murders, Malbrue stated he had shot “two 87 Gangsters.” Thus, the evidence that Malbrue was in a rival gang was highly relevant to show his motive for the shooting. While the victims were not actually gang members, Malbrue’s perception that they were would have provided a motive for him to commit the shootings.

Moreover, Arthur testified that one of the car’s occupants had stated that Durden had wronged the sister of a gang member who belonged to a related Hoover subclique, angering the gang members. Thus, the evidence of Malbrue’s gang membership was highly relevant to show why he – who was apparently not related to the woman in question – would feel duty-bound to exact revenge on the purported offender.

Evidence that Malbrue had solicited other gang members to intimidate the witnesses in the case was highly relevant to show his consciousness of guilt and to explain why some witnesses were reluctant to testify or had initially been less than honest.

Likewise, we find no error in the admission of the videotape. The prosecutor properly offered Gray's testimony that she attended a gang picnic where her husband videotaped Malbrue displaying a gun. This evidence was probative to show Malbrue had access to a firearm that looked like the one Footman and Arthur had seen in his possession.

The trial court's remarks on the record indicate it appropriately balanced the probative value of the videotape and gang evidence against its prejudicial effect. We find no abuse of discretion.

Malbrue complains, however, that the prosecutor initially proposed to offer limited gang evidence for a colorably proper purpose, but then "ignored the inherent limitations of in limine rulings" and "open[ed] the floodgates to a 'wake of gang-violence-fear testimony.'" (Underscoring in original.) Malbrue urges that "whatever the propriety of the trial judge's initial ruling admitting some gang evidence, the evidence actually admitted at trial, in the guise of gang evidence, comprised every sort of bad character evidence."

Malbrue has not preserved this issue on appeal, as he failed to object on Evidence Code section 352 or any other grounds to the gang-related evidence that he now contends

exceeded the scope of the trial court's initial ruling. (Evid. Code, § 353 [judgment may not be reversed by reason of the erroneous admission of evidence unless party timely objected or moved to strike, and made clear the specific ground of the objection]; *People v. Hayes* (1999) 21 Cal.4th 1211, 1261 [“ ‘A verdict may not be set aside on the basis of the erroneous admission of evidence . . . unless the party asserting error has preserved the question by a timely and specific objection to the admission of the evidence, or by a motion to strike or exclude the evidence.’ ”].) Malbrue contends that his “objection to the admission of absolutely any gang evidence, and specifically to the tape, obviate[d]” any finding of waiver. Malbrue did indeed object to admission of the videotape and gang identification testimony. However, the trial court's ruling clearly did not give the prosecutor carte blanche to introduce any and all evidence about gang habits and activities, and if defendant felt, as he now contends, that the prosecutor had elicited evidence beyond the scope of the trial court's ruling, an objection was required.

In any event, the majority of evidence Malbrue complains about was not objectionable under Evidence Code section 352. Much of Malbrue's argument is focused on his view that the evidence was not credible. As we have already explained, credibility determinations were for the jury, not for this Court.

Malbrue complains that the prosecutor's questioning of Edmond regarding gangs was improper. However, the prosecutor merely asked whether Edmond or her family members were gang members; whether she had heard of the Hoover gang and knew persons who belonged to it; and whether Malbrue and victim Haynes were gang

members. These questions were relevant to establishing Malbrue's gang membership and the motive for the murders. The prosecutor's query as to whether Edmond had told Durden that he was the target of the shooting because the 94 Hoover gang believed he was a member of the 87 Gangsters gang, was obviously highly relevant to the issue of Edmond's knowledge of the motive for the shooting.

Malbrue further complains about Corey's testimony. Specifically, Malbrue asserts that Corey's statements that rival gangs did not live harmoniously, that there had been other gang shootings in the neighborhood, and that he was especially vigilant and observant because of gang activity in the neighborhood, were improper. Such testimony was not objectionable, however, in that it went directly to a crucial issue in the case, the credibility of Corey's perceptions. The same was true of Travis's testimony that he had a heightened awareness of his surroundings because he had been shot several months before the murders.

Arthur's testimony regarding the 94 Hoover gang's procedures for storing guns was clearly probative on the issue of Malbrue's access to weapons. Testimony by various witnesses regarding their beliefs about the consequences of testifying against gang members, and about actual threats made, was obviously highly relevant for the reasons set forth *supra*. Testimony regarding the basis for the feud between the 87 Gangsters gang and the 94 Hoover gang was relevant to establish the rivalry between them. Thus, the majority of the testimony about which Malbrue complains was clearly admissible.

Finally, even assuming the evidence was admitted in error, we find no prejudice. The erroneous admission of character or prior misconduct evidence does not compel reversal unless it is reasonably probable that a result more favorable to the defendant would have been reached had the evidence been excluded. (Evid. Code, § 353; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1025; *People v. Felix* (1993) 14 Cal.App.4th 997, 1007-1008.) It is not reasonably probable Malbrue would have received a more favorable result had the evidence been excluded. While Malbrue complains that he was portrayed as one prone to violence, drug use, robbery, and murder, this portrait of Malbrue was not painted primarily by testimony about the practices or propensities of gangs, or the 94 Hoover gang, in general. Malbrue himself testified to smoking marijuana. His own threats to witnesses, not evidence regarding gang practices in general, established his capability for violence. The evidence against him was overwhelming. Based upon our review of the entire record, we find no reasonable probability that the jury was unduly influenced by testimony regarding the activities of other gang members or gangs in general. As the trial court explained, the evidence in the case “comes fairly close to proof beyond all possible doubt. Clearly it is proof beyond a reasonable doubt” Thus, even assuming some of the evidence was admitted in error, reversal is not warranted.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P.J.

KITCHING, J.